GEORGETOWN UNIVERSITY LAW CENTER

International and Comparative Antitrust Law

Spring Semester 2017

Professors Dina Kallay and Valeria Losco

THURSDAYS 1:20 p.m. – 3:20 p.m.

Hotung 5020

Course Description

More than a hundred countries have enacted competition laws and modeled their laws either on the U.S. or on the EU system. This course will focus on the U.S. and the EU antitrust regimes by comparing and contrasting their principles and procedures. Some new jurisdictions at the center of the international antitrust arena, such as China and Brazil, will also be discussed. This course will start with an overview of the institutional design and of the substantive standards applied by the FTC/DOJ in the U.S. and by the European Commission in the EU, and will then delve into various areas of antitrust law, with particular emphasis on cartels, horizontal and vertical restraints, abuse of dominance, and mergers. This course will also examine process and procedures in the U.S. and the EU, and consider practices that facilitate international cooperation in antitrust investigations.

Learning Goals

Students attending this course (i) will receive an overview of the international dimension of the various areas of antitrust law (horizontal agreements; monopolization/abuse of dominance; mergers); (ii) will learn to compare and contrast antitrust principles and procedures of the two systems (EU and U.S.) that most have influenced antitrust laws and institutions around the world; (iii) will familiarize with new actors and current challenges of the international antitrust arena. As a result, students will learn how to navigate multi-jurisdictional antitrust matters.

Class Requirements

The required casebook for the course is Einer R. Elhauge and Damien Geradin, Global Competition Law and Economics (2nd ed. 2011) (paperback edition).

The topics to be covered and assigned readings for each class are listed below. In addition to assigned readings in the Elhauge/Geradin book, there are a few other readings available at the links provided and on Canvas. This document reflects our best guess regarding topics covered, and readings, but we reserve the right to adjust it in due course in consideration of students’ backgrounds and objectives.

There will be a three-hour open book exam at the end of this course.
Consistent with Georgetown Law Center policy, regular and punctual attendance at class sessions is required of each student. More than two absences from class could impact students’ grades by as much as one step (i.e., it could result in a grade of B instead of a grade of B+).

Final grades for the course will be based on the final exam, subjective evaluation of class participation, and compliance with the attendance policy described above.

Module Topics and Assigned Readings

1) Class 1: January 19, 2017

a) **Topics:**
   - Overview of the course.
   - Open-ended survey of students’ objectives for the course.
   - The development of antitrust law.
   - The institutions of antitrust law.
   - Institutional design choices that influence quality and effectiveness of competition agencies:
     - Autonomy v. accountability;
     - Multi-member board v. unitary executive;
     - Stand-alone agency v. subsidiary;
     - One v. many enforcement agencies;
     - National enforcement v. intra-government enforcers;
     - State AGs in the U.S. and NCAs in the EU;
     - Mission and strategic goals of antitrust agencies (single-purpose or multi-purpose; enforcement v. competition policy);
     - Remedial measures;
     - Internal design (role of lawyers and economists);
     - Other factors.
   - Concurrent jurisdiction of FTC/DOJ in the U.S.
   - Institutional design of the EC.
     - Brexit.
   - Recent trends of competition agency design around the world.

b) **Readings:**
   - Chapter 1: pp. 1-4.

2) Class 2: January 26, 2017

a) **Topics:**
• Substantive standards of review applied by the FTC/DOJ in the U.S., by the EC in the EU, and by other antitrust agencies around the world.
  o U.S. Antitrust laws: Sherman Act 1890, Sec. 1 and 2; Clayton Act 1914; Hart-Scott-Rodino Act 1976; FTC Act Sec. 5 1914; state antitrust laws.
  o EU Antitrust laws: Art. 101 and 102 TFEU; EU merger regulation.
  o Other Jurisdictions: Non-competition based factors guiding antitrust policy and enforcement decisions.
    ▪ China: Role of industrial policy considerations in competition reviews (Art. 1 AML; AML enacted for, among other things, “promoting the healthy development of the socialist market economy”).
    ▪ South Africa: Public interest conditions in merger review (e.g. impact on employment and on the ability of small historically disadvantaged businesses to compete effectively).

b) Readings:

• Chapter 1: p. 12 to first paragraph of p. 17; pp. 28-30 (Consent Decree and the Interplay Between Public and Private Enforcement); p. 49 to second paragraph of page 57; pp. 70-72.


• Article: Terry Calvani, What is the Objective of Antitrust?, in Economic Analysis and Antitrust Law, 1988, pp. 7-14 (handout).


3) Class 3: February 2, 2017

a) Topics:

• Unilateral Conduct.
  o Structure of different rules in the U.S. and the EC: Monopolization v. abuse of dominance.
  o Applicable laws and legal standards in the U.S.:
    ▪ Sherman Act, Section 2 (Monopolization).
    ▪ FTC Act, Section 5 (Unfair methods of competition).
    ▪ Current debate on Section 5.
    ▪ Robinson-Patman Act.
  o Applicable laws and legal standards in the EU:
    ▪ Article 102 TFEU (Abuse of dominant position).
  o Similarities and differences between EU and U.S.: monopoly power v. dominant position.
  o Applicable laws and legal standards in other jurisdictions: The case of China and Japan.

b) Readings:

• Chapter 3: pp. 265-275; pp. 283-291 (Legal tests of monopoly power or a dominant position).
4) Class 4: February 9, 2017

a) Topics:

- Types of anticompetitive conduct.
  - Predatory Pricing:
    - Definition;
    - Factors considered for predatory pricing: below-cost pricing, recoupment of losses, entry conditions, competitive effects, predatory intent, justifications and defenses (e.g. adaptations to sudden changes of market conditions);
    - Legal basis: general v. specific provisions in various jurisdictions;
    - Different approaches in the U.S. and the EU;
    - Enforcement of predatory pricing cases around the globe;
      - ICN new recommended practices for predatory pricing investigations.
  - Price squeeze:
    - Definition;
    - Different approaches in the U.S. and the EU;
    - Pacific Bell Telephone v. Linkline Communications;
  - Excessive Price:
    - The Sasol Case in South Africa (June 2015).

b) Readings:

- Chapter 3: pp. 344-351; pp. 353-354; 476-477; 477-483 (Pacific Bell Telephone v. Linkline Communications); 485-488 (Deutsche Telekom v. Commission); p. 493 (Price Squeeze in Other Nations).


5) Class 5: February 16, 2017

a) Topics:

- Vertical restraints:
  - Definition;
  - Examples and basic economics of vertical restraints;
  - Approach to vertical restraints under U.S. law;
  - Treatment of vertical restraints in the EU:
    - Block exemption regulation and hardcore restraints;
• EU Guidelines on vertical restraints.
  • Vertical agreements fixing minimum resale prices.
    o The RPM regime in the EU.
    o Law developments in the U.S.
      ▪ Leegin Creative Leather Products v. PSKS, Inc.
      ▪ Trends in State RPM laws after Leegin.
• Debate on vertical restraints in the Internet era.
• Agency and court decisions in this area.

b) Readings:

• Chapter 5: pp. 695-699 (Introduction; Intrabrand distributional restraints on resale); pp. 743-764 (Vertical agreements fixing minimum resale prices; Leegin Creative Leather Products v. PSKS, Inc.).


Thursday February 23, 2017 NO CLASS – Monday classes meet instead of Thursday classes

6) Class 6: March 2, 2017

a) Topics:

• Horizontal agreements.
  o Applicable laws and legal standards in the U.S.:
    ▪ Sherman Act, Section 1 (Agreements in restraint of trade);
    ▪ Sherman Act, Section 2 (Monopolization);
    ▪ FTC Act, Section 5 (Unfair methods of competition);
    ▪ U.S. Antitrust Guidelines for Collaborations among Competitors.
  o Per se rule v. rule of reason in the U.S.
    • BMI v. Columbia Broadcasting System.
  o The relationship between TFEU 101(1) and TFEU 101(3): Hardcore conduct, object restraints, and system of exceptions.
    ▪ What constitutes a restriction of competition for purpose of Art. 101(1)?
    ▪ In what circumstances should such restriction be “trumped” by Article 101(3) benefits?

b) Readings:

• Chapter 2: pp. 73-85; pp. 88-96; p. 110 (Horizontal Price-Fixing Under EU Law); pp. 145-147 (U.S. Antitrust Guidelines for Collaborations Among Competitors).


7) Class 7: March 9, 2017

a) Topics:

- Horizontal agreements (Continued).
  - Standards for finding a horizontal agreement or concerted action.
  - Unilateral disclosure of information.
  - Differences between the U.S. and the EU.
    - The RBS/Barclays decision.
- Information sharing.
  - EC horizontal guidelines.
  - Difference between the U.S. and the EC.
    - Public domain v. publicly available.
  - Todd v. Exxon Corp. on benchmarking.
- Consequences of cartel infringements.
  - Criminal v. civil enforcement.
    - Is criminalization important for cartel enforcement?
  - Punishing, redressing and deterring antitrust violations.
    - Parental liability regime in Europe.
- Current data on anti-cartel enforcement.
  - Vigorous cartel enforcement throughout the world.
    - Examples of highest recent cartel fines.
    - Settlement programs.

b) Readings:

- Chapter 6: pp. 842-843; 883-884.

- The UK OFT’s RBS/Barclays decision (at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_of
t/ca-and-cartels/CE8950_08_dec.pdf).
  - Read Sections 1-4; 128-166; 204-265; 285-297; 314-328.


Thursday March 16, 2017 NO CLASS – Spring Break

8) Class 8: March 23, 2017

a) Topics:

- Leniency program and leniency policy.
  - Definition of leniency.
    - Total exoneration from penalty v. lower penalties.
  - Key elements of a good leniency program.
    - Severe sanctions.
    - High degree of being discovered and punished.
    - Leniency program should be transparent and predictable.
  - Pros and cons of “blowing the whistle.”
  - U.S. leniency program.
o EU leniency regime from its first introduction in 1996 to the Commission Notice of 2006.
  o Other leniency programs around the world: the Indian Program.
  o Conflict of interest.

b) **Readings:**

- **Indian leniency program:**


9) **Class 9: March 30, 2017**

a) **Topics:**

- The development of merger control regimes around the world.
- Section 7 of the Clayton Act and the HSR Act in the U.S.
- EU merger regulation.
- Types of merger control: e.g. mandatory v. voluntary regimes; suspensory v. non suspensory regimes; review of reportable and non-reportable transactions (the case of the U.S., EC, Brazil, China, India, and South Africa).
- Types of notification thresholds.
  - Brazil new notification threshold.
  - ICN recommended practices for merger notification.
- Standard of violation.
  - “Substantially lessen competition” (SLC standard) v. “Significantly impede effective competition” (SIEC standard).
  - Public interest conditions in merger review.
    - The *Walmart/Massmart* case in South Africa.
- Data on merger review.

b) **Readings:**

- Chapter 7: pp. 913-921.
10) Class 10: April 6, 2017

a) **Topics:**

- Overview of typical steps and different phases of a merger review.
- Pre-signing of a merger agreement.
- Antitrust provisions in a merger agreement: managing and allocating antitrust risk.
  - Antitrust termination fees and antitrust efforts clauses.
- Pre-notification.
  - Process in Brazil, China, and the EC.
- Notification.
  - Timing issues:
    - With respect to the notification itself;
    - With respect to “starting the clock.”
      - Timing implications of amending the notification.
  - Types of notification forms:
    - Form CO v. HSR form.
      - Level of detail.
      - Public v. confidential information.
    - Simplified v. standard form.
  - U.S. 4(c)/4(d) documents v. EC 5.4 documents.

b) **Readings:**


11) Class 11: April 13, 2017

a) **Topics:**

- Integration planning issues.
- Document creation guidelines, gun jumping issues.
- Phase 1 of the merger review.
  - Average duration.
  - Fast-track/early termination options.
  - Pull and re-file tool.
  - Market testing and agencies’ investigative tools.
  - Difference between the U.S. and the EC.
Level of publicity given to the process.
   - Confidentiality issues.
   - Comparing Australia, Brazil, U.S., and EC systems.
Participation of third parties.
○ Potential outcomes: expiration of the waiting period, agency decision, opening of a phase 2 investigation.

b) Readings:

12) Class 12: April 20, 2017

a) Topics:
   - Phase 2 of the merger review.
     ○ Average duration.
     ○ Agencies’ investigative tools.
   - Remedy negotiation and types of remedies.
     ○ Structural v. behavioral remedies.
     ○ Potential conditions not related to antitrust.
     ○ Divestiture process.
       ▪ Buyer up front.
       ▪ Divestiture package.
       ▪ Divestiture period.
       ▪ Divestiture trustee (different role in the U.S. and in the EU).
   - Opportunities for appeal or judicial review of an antitrust agency decision.
     ○ Who is the ultimate decision maker?
     ○ Different process of FTC and DOJ.
   - Carve out, hold-separate, close around options.

b) Readings:
   - Chapter 1: pp. 11-12 (The Remedial Structure); pp. 61-62 (Judicial review of Commission’s decisions).

13) Class 13: April 27, 2017

a) Topics:
   - International cooperation in antitrust and merger investigations.
   - Information sharing among antitrust agencies.
   - Confidentiality waiver.
   - Bilateral agreements.
   - Negative comity: e.g. the case of Canada.
   - ICN and OECD.
b) **Readings:**

